No. 16235

IN THE

United States

Court of Appeals

For the Ninth Circuit

SPOKANE COUNTY,

Appellant,

vs.

AIR BASE HOUSING, INC.,

Appellee.

Appeal from the United States District Court for the Eastern District of Washington.

BRIEF OF APPELLEE

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THE FRANKLIN PRESS, SPOKANE

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JURISDICTION

This appeal was taken by Spokane County from the district court's final judgment (Tr. 32) on one of multiple claims made by multiple party defendants in a condemnation action commenced by the United States.

The United States, on November 1, 1957, commenced condemnation of, and by declaration of taking (Tr. 3-8) filed on the same date acquired title to, the property described in the complaint and declaration of taking. Jurisdiction of the district court is sustained by 28 U.S.C., Section 1358.

On March 14, 1958 appellant, Spokane County, filed in the district court an "amended personal property tax and assessment lien statement" claiming a lien on the property taken (Tr. 8-9). On June 4, 1958, appellee, Air Base Housing, Inc., filed in the district court a petition for an order rejecting said tax claim and for a partial disbursement of the amount on deposit with the court (Tr. 10-22).

After a hearing held on June 26, 1958, the district court on July 2, 1958 entered findings of fact and conclusions of law which rejected Spokane County's tax claim (Tr. 22-32).

The district court found that multiple parties defendant, Air Base Housing, Inc. and Spokane County, had appeared in the condemnation action making mul-

tiple claims for payment from the deposit and any award which might be made in the action (Tr. 24). And the district court concluded that there was no just reason for delay in the entry of final judgment on the tax claim of Spokane County, and expressly concluded and directed that there should be entered an order of final judgment rejecting said tax claim (Tr. 31).

Accordingly, under Rule 54(b) of the Rules of Civil Procedure, final judgment rejecting the tax claim of Spokane County was entered on July 2, 1958 (Tr. 32-33). Notice of appeal was filed August 6, 1958 (Tr. 34).

Jurisdiction of this Court of Appeals is sustained by 28 U.S.C., Section 1291 and said Rule 54(b).

STATEMENT OF THE CASE

The statement of the case presented by appellant's brief (pages 1-4) is controverted as being incomplete. Hence this statement of the case.

The basic questions in this case involve the application of the provisions of Section 511 of the Housing Act of 1956 (70 Stat. 1110) approved August 6, 1956. Said Section 511 reads as follows:

> "Sec. 511. Section 408 of the Housing Amendments of 1955 is amended by adding at the end thereof the following: 'Nothing contained in the provisions of title VIII of the National Housing

> Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: *Provided,* That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property: *And provided further,* That the provisions of this section shall not apply to properties leased pursuant to the provisions of Section 805 of the National Housing Act as amended on or after August 11, 1955, which properties shall be exempt from State or local taxes or assessments.' "

In October 1956 Spokane County levied for taxes payable in 1957; and in October 1957 Spokane County levied for taxes payable in 1958 (Tr. 24-25). Those October 1956 and October 1957 tax levies made by Spokane County on the "Wherry Act Leaseholds" of Air Base Housing, Inc. were held by the district

court to be invalid in their entirety, by reason of determinations made by the designee of the Secretary of Defense pursuant to Section 511 of the Housing Act of 1956 (Tr. 26-27, 31).

The so-called "Wherry Act Leaseholds" of Air Base Housing, Inc. were based upon two leases of 1950 and one lease of 1951, all three leases being between the Secretary of the Air Force, representing the United States, and Air Base Housing, Inc. (Tr. 4-6).

As found by the district court (Tr. 24-25), Spokane County in 1955 and prior years had assessed said "Wherry Act Leaseholds" on a different basis than the assessment basis finally used by Spokane County in 1956 and in 1957 in assessing said leaseholds for taxes payable in 1957 and 1958, respectively. In 1956 Spokane County initially assessed said leaseholds upon the basis used in 1955 and prior years; but after the decision of the Supreme Court of the United States in *Offutt Housing Company vs. County of Sarpy,* 351 U.S. 253, on May 28, 1956 and before equalization of 1956 assessments, Spokane County amended its assessment of said "Wherry Act Leaseholds" to an assessment of the leaseholds based upon the full value of the buildings and improvements covered by said "Wherry Act" leases, a basis of valuation which had been upheld in said Offutt case, involving "Wherry Act Leaseholds" in the State of Nebraska (Tr. 24-25). Subsequent to said amended

assessment, and in October 1956 as required by Section 84.52.030 of the Revised Code of Washington, the Spokane County Commissioners made a tax levy in specific amount on said leaseholds, for personal property taxes payable in 1957 (Tr. 25). Upon the same amended assessment basis, in October 1957 the Spokane County Commissioners made a tax levy in specific amount on said leaseholds, for personal property taxes payable in 1958 (Tr. 25).

The basis of taxation upheld in the Offutt case, *supra,* was subsequently upheld by the Supreme Court of the State of Washington in *Moses Lake Homes, Inc. v. Grant County,* 51 Wn. 2d 285, 317 P. 2d 1069 (1957), as set forth in the statement of the case in appellant's brief (page 2). However, it should be noted that said state court decision involved an action to enjoin the levy of taxes for the year 1955 and thereafter, and that in said case there was not presented to the state courts any question involving application of Section 511 of the Housing Act of 1956, approved August 7, 1956. In that case the Supreme Court of the State of Washington did not give any consideration whatever to Section 511 of the Housing Act of 1956.

Legislation, which became the Housing Act of 1956, was pending in Congress when said Offutt case was decided on May 28, 1956; and the Congress gave consideration to the effect of that case in formulating new statutory provisions respecting taxation of

"Wherry Act Leaseholds" (Tr. 25). Said Offutt case was mentioned by the House Committee on Banking and Currency in House Report No. 2363, June 15, 1956 [to accompany H.R. 11742], in the section of that report entitled "Taxation of Wherry Act Leaseholds" justifying and explaining the provisions of Section 603 of H.R. 11742, which with some modifications became Section 511 of the Housing Act of 1956, approved August 7, 1956 (Tr. 25).

The October 1956 personal property tax levy made by Spokane County on the "Wherry Act Leaseholds" of Air Base Housing, Inc. (for taxes payable in 1957) totaled $83,796.19, of which $39,751.85 was paid under protest in April 1957 to Spokane County by Air Base Housing, Inc. (Tr. 25-26). The balance, together with interest amounting to $182.23 on November 1, 1957, was claimed by Spokane County in this condemnation action to be a lien which had been transferred to and was payable from the deposit and any award which might be made in this condemnation action (Tr. 26). The October 1957 personal property tax levy made by Spokane County on the "Wherry Act Leaseholds" of Air Base Housing, Inc. (for taxes payable in 1958) totaled $90,894.22, which amount likewise was claimed by Spokane County in this action to be a lien which had been transferred to and was payable from the deposit and any award which might be made in this condemnation action (Tr. 26).

On April 29, 1958 George S. Robinson, Deputy Special Assistant for Installations, Department of the Air Force, made "Determination Under Section 408 of the Housing Amendments, as amended: Fairchild Air Force Base, Washington (FHA Projects 171-8002, 3 and 4)" (Tr. 15-17). In the district court counsel stipulated (Tr. 26) that said determination dated April 29, 1958 was made by the duly designated designee of the Secretary of Defense.

As the district court found (Tr. 27) said determination's "Statement of Payments made by Federal Government and Expenditures by Federal Government or Lessee for the Wherry Housing Project, Fairchild Air Force Base, Washington, FHA Projects, Nos. 171-8002, 3 and 4" totaled $109,025.68 for 1956, compared to the tax levy of $83,796.19 made on said "Wherry Act Leaseholds" by Spokane County in October of 1956; and said determination's "Statement of Payments * * *" totaled $113,018.45 for 1957, compared to said tax levy of $90,894.22 made on said "Wherry Act Leaseholds" by Spokane County in October of 1957.

On May 8, 1958, the designee of the Secretary of Defense filed with the County Treasurer of Spokane County said determinations of the deductions to be made from the taxes for the years 1957 and 1958 under the provisions of Section 511 of the Housing Act of 1956; and soon thereafter on June 4, 1958 Air Base Housing, Inc. filed in the district court con-

demnation action its petition for order rejecting tax claim of Spokane County and for partial disbursement of deposit (Tr. 10-22).

The aforesaid tax claim of Spokane County and the aforesaid petition of Air Base Housing, Inc. came on before the district court for hearing on June 26, 1958 (Tr. 22).

Neither by any pleading, nor by any contention made at the hearing, did Spokane County make any claim that the determinations made by the designee of the Secretary of Defense were arbitrary or capricious. And, the district court found (Tr. 27): "There has been no showing that said Determinations by said designee of the Secretary of Defense are arbitrary or capricious."

There followed the district court's findings of fact (Tr. 22-28), conclusions of law (Tr. 28-32) and the district court's "Final Judgment Rejecting the Tax Claim of Spokane County" (Tr. 32-33) from which Spokane County took this appeal.

SUMMARY OF ARGUMENT

With respect to appellant's three specifications of error (Br. 4-5):

I.

Appellant has abandoned (Br. 5) its first specification of error (Br. 4) which was directed at conclusion of law No. I. Accordingly, the district court's conclusions of law I, II, III and IV (Tr. 29) all stand unquestioned on this appeal.

II.

> "Under the Constitution of the State of Washington, as interpreted by the Supreme Court of the State of Washington, the 1956 personal property tax levy made by Spokane County on the 'Wherry Act Leaseholds' of Air Base Housing, Inc., could not have become a valid or effective lien for a tax until the tax levy was made by the County Commissioners in October, 1956; and, therefore, said 1956 levy did not encumber said 'Wherry Act Leaseholds' prior to June 15, 1956, the effective date of the first proviso in Section 511 of the Housing Act of 1956."

The above quoted conclusion of law No. VII (Tr. 30) was correctly made by the district court; and argument by appellant (Br. 5-21) in support of its second specification of error is untenable in view of the controlling, *en banc* decision of the Supreme Court of Washington in *Puget Sound Power & Light Co. v. Cowlitz County,* 38 Wn. 2d 907, 234 P. 2d 506 (1951).

III.

Appellant's third specification of error: "The court erred in entering Conclusion of Law No. V (Tr. 30) that there could be no judicial review of the determinations made by the Secretary of Defense" (Br. 5) has been abandoned by Appellant's Brief (p. 21) wherein appellant states: "A judicial review of the determinations of the Secretary of Defense is not sought." Accordingly, the district court's conclusion of law No. V, as well as conclusion of law No. VI, now stands unquestioned on this appeal.

In any event, neither the Secretary of Defense nor his designee is a party to this suit, and the determinations made under Section 511 of the Housing Act of 1956 by the Secretary of Defense or his designee cannot be attacked collaterally in this action.

In any event, appellant's right of judicial review, if any, was under the Administrative Procedure Act, 5 U.S.C., Section 1001, et seq., in an action in the District of Columbia where the courts have jurisdiction and venue over the Secretary of Defense and his designee.

In any event, there is no merit to the question raised in appellant's brief (pages 21-23)—without specification of error—concerning "the interpretation of the meaning of Section 511."

ARGUMENT

Introduction

At the outset it should be noted that there is no question of fact involved in this appeal. The facts are as found by the district court (Tr. 22-28). Appellant Spokane County has not specified any error in the findings of fact which were consented to by Spokane County's attorney (Tr. 28).

Appellant made three specifications of error (Br. 4-5), directed against the district court's conclusions of law No. I (Tr. 29), Nos. VII and VIII (Tr. 30-31) and No. V (Tr. 30), respectively. Specification of error No. I definitely has been abandoned; and specification of error No. III appears to have been abandoned.

The three parts of the following argument are responsive to the three divisions of appellant's argument (Br. 5-23).

I.

"Congress had constitutional power to enact Section 511 of the Housing Act of 1956, and thereby to permit state and local taxation of 'Wherry Act Leaseholds' subject to the conditions provided in Section 511."

The above subheading is a quotation of the district court's conclusion of law No. III (Tr. 29). It was predicated, in part, on conclusion of law No. I (Tr. 29) to which appellant's specification of error No. I (Br. 4) was directed.

Appellant has abandoned that specification of error in view of cited decisions of the Supreme Court of the United States (Br. 5).

Accordingly, it is now clear that conclusions of law Nos. I, II, III and IV (Tr. 29) all stand unquestioned on this appeal.

It follows, without citation of authority being necessary, that the provisions of Section 511 of the Housing Act of 1956 (page 2, this brief) are supreme law of the land, and that state and local taxation of "Wherry Act Leaseholds" can be valid only if in compliance and conformance with the conditions provided in said Section 511.

II.

"Under the Constitution of the State of Washington, as interpreted by the Supreme Court of the State of Washington, the 1956 personal property tax levy made by Spokane County on the 'Wherry Act Leaseholds' of Air Base Housing, Inc., could not have become a valid or effective lien for a tax until the tax levy was made by the county Commissioners in October, 1956; and, therefore, said 1956 levy did not encumber said 'Wherry Act Leaseholds' prior to June 15, 1956, the effective date of the first proviso in Section 511 of the Housing Act of 1956."

The above subheading is a quotation of the district court's conclusion of law No. VII (Tr. 30). To that conclusion and conclusion of law No. VIII (Tr. 31), appellant's specification of error No. II (Br. 5) is directed.

Appellant's argument in support of its second specification of error (Br. 5-21), in part and in effect, asks this court to disregard the *en banc* decision of the Washington Supreme Court in *Puget Sound Power & Light Co. v. Cowlitz County,* 38 Wn. 2d 907, 234 P. 2d 506 (1951).

In that case, personal properties of the company were in its private ownership on the statutory assessment valuation date of January 1, 1948. Between May and September 1948 the company's privately owned utility properties in each of five counties were sold, respectively, to the five Public Utility Districts (municipal corporations) located in said counties. Later, in October 1948 each of the counties made tax levies in specific amounts on the 1948 assessment valuations of said properties, as taxable to the private company, for taxes payable in 1949. In 1949 the private company, under protest, paid the taxes to the five counties and brought an action against the five counties to recover back the taxes paid under protest. The private company contended that the properties became tax exempt under the state constitution when the properties passed into ownership of the municipal corporations, the public utility dis-

tricts, and that personal property taxes could not become valid, enforceable tax liens on the properties until the tax levies were made in October 1948—after the properties had passed into public ownership.

The counties, through the State Attorney General, relied upon two earlier decisions of the state supreme court holding that personal property tax liens related back to the assessment valuation date. The private company contended that the rule of another earlier decision of the state supreme court involving real property, *State v. Snohomish County,* 71 Wash. 320, 128 Pac. 667 (1912), should be applied to personal property, and recovery of the taxes allowed.

The county court sustained a demurrer to the private company's complaint. On appeal the state supreme court, by a seven to two decision, reversed the county court, applied to the personal property the rule of the Snohomish County case, *supra;* and overruled the two earlier cases relied upon by the attorney general and the county court.

The opinion in the earlier Snohomish case, *supra,* was quoted extensively in the 1951 opinion of the court in the Cowlitz case, with italics supplied by the court. Part of the quotation, pertinent here, reads as follows (38 Wn. 2d 907, 912, 234 P. 2d 506, 509):

> "'The process of taxation is initiated on that day by the assessor then beginning the valuation of all property in the county, fixing the valuation

of each property as of that date. The work of valuation necessarily covers a considerable period of time. As the next step in process, the board of equalization, meeting in August, revises the assessment as made by the assessor. Thereafter, in September, and as another step in the process, the corporate authorities of the cities, towns, and school districts estimate the amount of revenue needed for their respective uses; *and finally, as the last step in the process of taxation, the board of county commissioners* and other taxing authorities *in October levy the tax in specific sums. Then for the first time the concept of a tax is fully realized.* The fact that the lien of the tax so created is by relation attached to specific property as of the date of the initiation of the process on March 1, cannot do away with the necessity of pursuing the whole statutory proceeding before any tax is created so as to attach as a lien as of that or any date. While the state has power for the purposes of the lien to treat the entire proceeding as having been taken at any given time, that fact does not do away with the necessity of any step in the proceeding. *It seems self-evident that there can be no valid or effective lien for a tax until there is a valid tax in some specific amount.*

'Obviously the doctrine of relation pre-supposes a valid creation. It seems equally plain that the creation of a valid tax implies the existence of a susceptible subject of taxation at every stage of the process of such creation. Since, on general principles of public policy and by both constitutional declaration and statutory enactment, lands while held in public ownership are exempt from taxation, the land here in question was not, during any step in the proceedings creating the tax, *after August 9, 1907, when it passed to the state, a susceptible subject of taxation. It fol-*

> *lows that, at that time, the developing process of imposing the tax as a valid creation was arrested.'"* (Italics the Court's.)

In the Cowlitz County case, the rule of the early Snohomish County case was applied to personal property, and the court stated its holding as follows (38 Wn. 2d 907, 916, 234 P. 2d 506, 511):

> "[3, 4] We hold that the exemption from taxation granted in the fourteenth amendment to the state constitution applies with equal force to both real and personal property acquired by a municipal corporation, and that, since there can be no valid tax until there has been a levy specifying the amount thereof (51 Am. Jur. 621, Taxation, Sec. 656), and since title to the operating properties involved in this case passed to the several municipal corporations prior to the date of the levy, these properties were not subject to 1949 taxes."

The Cowlitz County case, *supra,* is the law of the State of Washington.

Appellant attempts to avoid the controlling effect of the Cowlitz County case (Br. 11-21); but as shown in the following paragraphs appellant's argument is inaccurate and unsound.

A federal tax immunity (entire or partial) provided by Congress for a federal instrumentality has standing at least equal to a tax exemption provided by the Washington State Constitution for municipal corporations.

In 1952 the United States Supreme Court, in *Carson v. Roane-Anderson Co.,* 342 U.S. 225, 96 L. Ed. 252, 72 S. Ct. 360, held that certain challenged sales taxes and use taxes imposed by Tennessee, although not forbidden by the Federal Constitution were prohibited by the Atomic Energy Act of 1946. And, the opinion for the unanimous court of eight justices participating stated (342 U.S. 225, 234-235):

> "The constitutional power of Congress to protect any of its agencies from state taxation (Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 84 L. Ed. 11, 60 S. Ct. 15, 124 ALR 1263; Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 86 L. Ed. 65, 62 S. Ct. 1) has long been recognized as applying to those with whom it has made authorized contracts. See Thomson v. Union Pacific R. Co., (U.S.) 9 Wall 579, 588, 589, 19 L. Ed. 792, 797, 798; James v. Drago Contracting Co., 302 U.S. 134, 160, 161, 82 L. Ed. 155, 172, 173, 58 S. Ct. 208, 114 ALR 318. *Certainly the policy behind the power of Congress to create tax immunities does not turn on the nature of the agency doing the work of the government.* The power stems from the power to preserve and protect functions validly authorized (Pittman v. Home Owoners' Loan Corp., Supra, 308 U. S. p. 33, 84 L. Ed. 16, 60 S. Ct. 15, 124 ALR 1263)—the power to make all laws necessary and proper for carrying into execution the powers vested in the Congress. U.S. Const. Art. 1, Sec. 8, cl. 18." (Italics added.)

When, notwithstanding the Atomic Energy Act of 1946 and the Carson case, *supra,* the Washington Supreme Court, by its six to three decision in *General*

Electric Co. v. State, 42 Wn. 2d 411, 256 P. 2d 265 (1953), upheld business and occupation taxes on General Electric, a private corporation and independent contractor—the state court's judgment was reversed by the United States Supreme Court by per curiam decision, citing the Carson case, *supra, General Electric Co. v. Washington,* 347 U.S. 909, 98 L. Ed. 1066, 74 S. Ct. 474 (1954).

In view of the ultimate outcome in the General Electric case, *supra,* the dissenting opinion of Judge Donworth of the State Supreme Court is significant, 42 Wn. 2d 411, 431, 256 P. 2d 265, 277, wherein he quoted and relied upon the supremacy clause of Article VI of the United States Constitution.

Especially in view of the General Electric case, *supra,* it is clear that in *Moses Lake Homes v. Grant County,* 51 Wn. 2d 285, 317 P. 2d 1069 (1957), the Washington Supreme Court recognized that the manner and extent of state and local taxation of "Wherry Act" leaseholds is controlled by federal legislation, since the Congress had the constitutional power to grant entire tax immunity to those leaseholds held by private corporations or to fix "the extent of the Federal Government's waiver of immunity of Federal projects from state and local taxation * * *."

The Congressional amendment of the "Wherry Act," by Section 511 of the Housing Act of 1956, had the same operative and interruptive effect upon the

Washington state taxing processes as the conveyances of privately owned properties to tax exempt public utility districts had in the case of *Puget Sound Power & Light Co. v. Cowlitz County, supra.*

Moreover, analysis of the situation of Air Base Housing, Inc. shows that that private corporation was in a stronger situation than was Puget Sound Power & Light Co. in the Cowlitz case, *supra.*

As shown by the General Electric and Moses Lake Homes cases, *supra,* even though Air Base Housing, Inc. was a private corporation operating under a lease of the Government owned housing project, tax immunity of the leaseholds and the extent of waiver of tax immunity of the leaseholds were matters within the control of the Federal Government.

Puget Sound Power & Light Co. was not a governmental instrumentality and its personal property on the assessment date in 1948 did not have even a tinge of tax immunity. Yet, because tax immunity developed upon the purchases of the property by the municipal corporations before the October 1948 tax levies in specific amounts, the private corporation was entitled to recover back the personal property taxes paid under protest.

In the case of Air Base Housing, Inc., the "Wherry Act" leaseholds were subject to taxation only to "the extent of the Federal government's waiver of immunity of Federal projects from state and local tax-

ation"—at the time of the assessments made in 1956, and also in prior years. In 1955 and earlier years, *and when Spokane County assessed the leaseholds early in 1956 and made an amended assesment on June 12, 1956,* the housing project at Fairchild Air Base was public property owned by the United States, and the leaseholds of that project held by Air Base Housing, Inc. could be taxed only in the manner and to the extent tax immunity was waived by Congress in the "Wherry Act."

The manner and extent of the Federal Government's waiver of tax immunity was changed by Act of Congress on August 7, 1956, before the 1956 taxing processes were completed by the October 1956 tax levy in specific amount. And, upon the authority of the Cowlitz County case and other cited cases, *supra,* Section 511 of the Housing Act of 1956 had an interruptive effect upon the taxing processes, of a standing at least equal to that of the sale of privately owned properties to municipal corporations, involved in the Cowlitz case, *supra.*

Moreover, it should be noted that the Washington State Constitution recognizes the controlling effect of Federal legislation on state and local taxation of Federal instrumentalities. The 19th Amendment of the Washington State Constitution provides as follows:

> "The United States and its agencies and instrumentalities, and their property, may be taxed under any of the tax laws of this state, whenever and in such manner as such taxation may be authorized or permitted under the laws of the United States, notwithstanding anything to the contrary in the Constitution of this state. [1945 p. 932, House Joint Resolution No. 9. Approved November, 1946.]"

It follows that under the Washington Constitution, Section 511 of the Housing Act of 1956, approved August 7, 1956, controlled taxation of the leaseholds of Air Base Housing, Inc. before the October 1956 levy, the last step in the 1956 taxing processes, and therefore before there could be a valid or effective tax lien on the leaseholds.

Only brief comment need be made on cases cited and discussed in part II of appellant's brief (Br. 5-21).

United States v. Alberts, 55 F. Supp. 217 (1944)—(Br. 7)—involved taxes for 1944, levied in October 1943; and ownership of the two tracts involved passed to the United States in November 1943 and February 1944—after the October 1943 levy. The case did not, therefore, involve the type of situation presented in the Cowlitz County case, *supra,* or in this appeal.

Klickitat Warehouse Co. v. Klickitat County, 42 Wash. 299, 84 Pac. 860 (1906)—(Br. 8)—did not involve any change in taxability or extent of taxability between assessment date and levy date.

Puyallup v. Lakin, 45 Wash. 368, 88 Pac. 578 (1907)—(Br. 8)—was expressly overruled by the Cowlitz County case, 38 Wn. 2d 907, 914, 234 P. 2d 506, 510 (1951).

Neither *Dingle v. Camp,* 121 Wash. 393, 209 Pac. 853 (1922) nor *Ernst v. Guarantee Millwork, Inc.,* 200 Wash. 195, 93 P. 2d 404 (1939)—(Br. 9)—involved any change in taxability or extent of taxability between assessment date and levy date.

The 1921 case of *Puget Sound Power & Light Co. v. Seattle,* 117 Wash. 351, 201 Pac. 449—(Br. 9)—was expressly overruled by the 1951 Cowlitz County case, 38 Wn. 2d 907, 916, 234 P. 2d 506, 511, insofar as the 1921 case was inconsistent with the 1951 opinion.

As stated by appellant (Br. 9), *State v. Snohomish County,* 71 Wash. 320, 128 Pac. 667 (1912) decided "that a levy was necessary to establish the lien on real property"—and in the 1951 Cowlitz County case, *supra,* the court applied the Snohomish County case real property rule to personal property and decided that a levy was necessary to establish the lien on personal property. With respect to what was said by the court in the earlier Snohomish County case, relating to personal property taxes, the court in the 1951 Cowlitz County case said it "was pure *dictum,* there being no such taxes involved, and is to be disregarded as authority in this case." 38 Wn. 2d 907, 914, 234 P. 2d 506, 510.

Public Utility District No. 1 of Lewis County v. Pierce County, 24 Wn. 2d 563, 166 P. 2d 933 (1946) —(Br. 10)—was decided before the 1951 Cowlitz County case, *supra;* and that 1946 decision is not inconsistent with the 1951 decision.

State ex rel. Peoples National Bank of Washington v. King County, 36 Wn. 2d 10, 216 P. 2d 225 (1959) did not involve any change in taxability or extent of taxability between assessment date and levy date, but merely a matter of priorities.

With reference to the 1951 Cowlitz County case, *supra,* appellant states (Br. 12): "It is to be noted that the court did not say there could be no lien until the levy was made." That notation is inaccurate. In the Cowlitz case, the court (adding its own italics) quoted with approval and applied to personal property the following language from the earlier Snohomish County case (38 Wn. 2d 907, 912, 234 P. 2d 506, 509):

> *"It seems self evident that there can be no valid or effective lien for a tax until there is a valid tax in some specific amount."*

That statement, emphasized by the court in the Cowlitz County case, is an essential part of the opinion and decision in that case.

In *Anderson v. Grays Harbor County,* 49 Wn. 2d 89, 297 P. 2d 1114 (1956)—(Br. 12)—the court did state that "a lien is an encumbrance upon property

as security for the payment of a debt." But that case, irrelevant to appellant's second specification of error, held, under a special statute providing for a "yield tax" on certain classes of forest lands, that the "yield tax" which covered logging operations in 1948, 1949 and 1950 "did not become a lien against the land until after the company, on September 18, 1953, filed a cutting report covering its operations covering those years."

The cases cited on pages 13-15 of appellant's brief, involving California, Missouri, New Hampshire and Alabama taxes are irrelevant to this appeal, for what is involved in appellant's specification of error No. II is the law of the State of Washington.

The memorandum decision of the county court, in case No. 152332 in the Superior Court of the State of Washington in and for the County of Spokane, quoted in appellant's brief (Br. 16-21) is, as stated by appellant, on appeal to the Washington Supreme Court. It is respectfully submitted that this Court of Appeals should not give any weight to that county court decision.

The *enbanc* decision of the Supreme Court of the State of Washington in the Cowlitz County case, *supra,* and the authorities and argument in this part of appellee's brief all show that there was no error in the district court's conclusions of law Nos. VII and VIII (Tr. 30-31).

And, it should be noted that in tax cases the Washington Supreme Court follows the rule of strict construction in favor of the taxpayer. That court stated in *Buffelen Lbr. & Mfg. Co. v. State,* 32 Wn. 2d 40, 43, 200 P. 2d 509, 511 (1948):

> "It must be borne in mind that, if there is any doubt as to the meaning of a taxing statute, it must be construed most strongly against the taxing power in favor of the citizen."

And, that statutory rule of strict construction in tax cases, in favor of the taxpayer, was referred to and applied by the Washington court, sitting *en banc,* as recently as February 26, 1959, *In the Matter of the Estate of Della E. Ehler,* 153 Wash. Dec. 622, 624, ... P. 2d .....

III.

Appellant has abandoned Specification of Error No. III. In any event, determinations made by the Secretary of Defense cannot be reviewed in this action. In any event, there is no merit to the question raised in appellant's brief.

In the first paragraph under part III of appellant's argument (Br. 21), appellant states: "A judicial review of the determinations of the Secretary of Defense is not sought." That statement, it is submitted, amounts to abandonment of appellant's specification of error No. III (Br. 5) which reads: "The court erred in entering Conclusion of Law No. V (Tr. 30) that there could be no judicial review of the determinations made by the Secretary of Defense."

It should be noted that appellant's specification of error No. III does not accurately describe the first part of conclusion of law No. V (Tr. 30) which deals with judicial review, but omits the qualifying clause, "in the absence of arbitrary and capricious action,". It should be noted further that finding of fact No. IX (Tr. 27) reads: "There has been no showing that said Determinations by said designee of the Secretary of Defense are arbitrary or capricious." And, no specification of error has been directed to conclusion of law No. VI (Tr. 30) that "There has been no showing of any arbitrary or capricious action in the determinations made under Section 511 by the designee of the Secretary of Defense for the years 1956 and 1957 * * *."

In view of the apparent abandonment of specification of error No. III, conclusion of law No. V, as well as No. VI, now stands unquestioned on this appeal.

In any event, even if specification of error No. III not be deemed by this court to have been abandoned, the determinations under Section 511 of the Housing Act of 1956 made with respect to the "Wherry Act Leaseholds" of appellee cannot be reviewed in this action or on this appeal.

The transcript of record shows that neither the Secretary of Defense nor his designee is a party to this action. The transcript of record also shows, by

Exhibits A, B and C (Tr. 15-20), certified copies of which were received in evidence (Tr. 26), that the Secretary of Defense and his duly designated designee had their official residence in Washington, D. C.

They and their successors, if any, are indispensable parties to any action to review, modify or reverse any of said Section 511 determinations; they are not parties to the action in which this appeal has been taken; and they are beyond the jurisdiction of the district court from which this appeal has been taken.

As stated by the court in *Mouton v. United States,* D. C., W. D. Wash., 106 F. Supp. 336, 337 (1952):

> "The heads of the Executive Departments of the Government, such as the Postmaster General, Ernest v. Fleissner, D.C., 38 F. Supp. 326, and the Secretaries of the Treasury and of Commerce, U.S. v. Tacoma, etc., S. S. Co., 9 Cir., 86 F. 2d 363, at page 368, and the Secretary of Labor, Grandillo v. Perkins, D.C., 36 F. Supp. 546, and the Secretary of the Interior, Tribal Council of Blackfeet Indian Reservation v. Ickes, D.C., 58 F. Supp. 584, are as a general rule amenable to suit only in the District of Columbia, the District of their official residence. They, except in special circumstances not involved here, are not suable in this Court in the Western District of Washington. See, generally, Butterworth v. Hill, 114 U.S. 128, 5 S. Ct. 796, 29 L. Ed. 119; and 28 U.S.C.A Sec. 1391(b). Upon the same authorities, and for the same reasons, the above named Secretary of the Navy is not suable in this Court.
>
> * * * *

> "The Federal Administrative Procedure Act, supra, does not in any material way prevent the application of the foregoing principles to this case. Blackmar v. Guerre, 342 U.S. 512, 72 S. Ct. 410, 96 L. Ed. ....."

Torres v. McGranery, D. C., S. D. Cal., 111 F. Supp. 241 (1953); *Adcox Schools v. Administrator of Veteran Affairs,* 9 Cir., 217 F. 2d 54 (1954), and *Blackmar v. Guerre,* 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534 (1952), are to the same effect.

Moreover, Spokane County's right to judicial review, if any, of the Section 511 determinations was a right under the Administrative Procedure Act, 5 U.S.C., Sections 1001, et seq. But if said determinations were reviewable under 5 U.S.C., Section 1009, they would be reviewable only in a court of "competent jurisdiction." And, it must be in the district where the Secretary of Defense and his designee could be served. The courts of the District of Columbia are the only courts of "competent jurisdiction" to reach the Secretary of Defense and his designee whose official residences are in the District of Columbia. The Blackmar and Adcox School cases, *supra,* expressly hold to that effect.

Furthermore, Spokane County having failed to exercise its right, if any, to appeal the Section 511 determinations directly—by resort to the Administrative Procedure Act, *supra,*—cannot now attack those determinations collaterally in this action. As

the court stated in *Elbow Lake Coop. Grain Co. v. Commodity Credit Corp.,* D. C. Minn., 144 F. Supp. 54, 61-62 (1956):

> "Where, as here, the action of an agency is of a quasi judicial character, it is well established that the validity of its order cannot be attacked by collateral proceedings. Callanan Road Imp. Co. v. United States, 1953, 345 U.S. 507, 73 S. Ct. 803, 97 L. Ed. 1206; Stanley v. Supervisors of Albany County, 1886, 121 U.S. 535, 550, 7 S. Ct. 1234, 30 L. Ed. 1000; Reconstruction Finance Corp. v. Lightsey, 4 Cir., 185 F. 2d 167. Between the provisions of the Grain Standards Act and the regulations issued thereunder, and the provisions of the Administrative Procedure Act, 5 U.S.C.A., Sec. 1001 et seq., plaintiffs are afforded ample and sufficient opportunity to appeal these findings directly. They cannot now attack them in this collateral proceeding."

And, as the court held in *Reconstruction Finance Corp. v. Lightsey,* 4 Cir., 185 F. 2d 167, 170 (1950):

> "Even were the action of the Housing Expediter reviewable by the District Court, this case must be reversed for another reason. Administrative action is conclusive on review unless such action is not in accordance with law, is unsupported by competent, material, and substantial evidence, or is arbitrary or capricious. Philadelphia Co. v. Securities and Exchange Commission, 85 U.S. App. D.C. 327, 177 F. 2d 720; Montana-Dakota Utilities Co. v. Federal Power Commission, 8 Cir., 169 F. 2d 392, certiorari denied 335 U.S. 853, 69 S. Ct. 82, 93 L. Ed. 401; National Broadcasting Company v. United States, D.C., 47 F. Supp. 940."

Considering this appeal in the light of the criteria of the Lightsey case, *supra,* it should be noted that in this case on appeal the district court found and concluded—without any claim of error—that there was not any arbitrary or capricious action involved in the Section 511 determinations. Nor has there been any claim of lack of competent, material and substantial evidence. — Of said criteria there is left only the question whether "such action is not in accordance with law."

In any event—even if "the interpretation of the meaning of Section 511" (Br. 21), which appellant questions, could be considered on this appeal, without specification of error, in a collateral attack and in the absence of the Secretary of Defense and his designee—appellant's contention would be found to be without merit.

Reference to the United States Supreme Court's recognition of Congressional permission for state taxation of "Wherry Act Leaseholds", and reference to legislative history of the Housing Act of 1956, show that appellant's contention is without merit.

On May 28, 1956 the Supreme Court of the United States decided *Offutt Housing Co. v. Sarpy,* 351 U. S. 253, 100 L. Ed. 1151, 76 S. Ct. 814. The five to four decision affirmed the judgment of the Supreme Court of Nebraska, which had held "that Congress had given Nebraska the right to tax petitioner's

(lessee's) interest in the property (Wherry Military Housing Project) * * *." (351 U. S., at p. 256.)

The majority opinion limited the scope of decision, as regards Nebraska's power to tax the lessee's interest, to the question of Congressional consent.

> "The line of least resistance in analysis of our immediate problem is to ascertain whether Congress has given consent to the type of state taxation here asserted." (351 U. S., at p. 257.)

And after analysis of the applicable statutes, the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949 (adding Title VIII to the National Housing Act), the court stated its decision (351 U. S., at p. 260):

> "We hold only that Congress, in the exercise of this power, has permitted
>
> *[261]
>
> *such state taxation as is involved in the present case."

Legislation, which became the Housing Act of 1956, was pending in Congress when the Supreme Court decided the Offutt case; and the Congress dealt with the problems involved in taxation of "Wherry Act Leaseholds." Mentioning the Offutt case, the House Committee on Banking and Currency stated in House Report No. 2363, June 15, 1956 [to accompany H. R. 11742], (U. S. Code Congressional and Administrative News, 1956, vol. 3, page 4509, 4555):

"TAXATION OF WHERRY ACT LEASEHOLDS

"The bill would clarify congressional intent with respect to the rights of local communities to tax the interests of mortgagors under the Wherry Act mortgage insurance program (title VIII of the National Housing Act prior to the Housing Amendments of 1955) who have leased the mortgaged property from the United States.

* * * *

"Section 603 [which became Section 511] of the bill would expressly provide that nothing contained in title VIII or other law shall be construed to exempt from State or local taxes or assessments any right, title, or other interest of a lessee from the Federal Government with respect to any property covered by a mortgage insured under that title. However, *the section would provide that any such taxes or assessments must be reduced* (from the amount otherwise levied or charged) by such amount as the Federal Housing Commissioner determines to be equal to (1) any payments in lieu of taxes made by the Federal Government to the local taxing bodies with respect to the property plus (2) any expenditures made by the Federal Government for streets, utilities, and other services for or with respect to the property. For purposes of these deductions, initial capital expenditures by the Federal Government for the services referred to could be allocated over such period of years as the Commissioner determined to be appropriate.

* * * *

"The recent decision of the Supreme Court of the United States in the case of Offutt Housing Company v. County of Sarpy (May 28, 1956) upheld the right of local taxing officials in the

State of Nebraska to levy certain State and county 'personal property' taxes against the lessee's interest in a title VIII project, measured by the full value of the buildings and improvements. However, as a large portion of the projects have not been subject to State and local taxes, *payments in lieu of taxes have frequently been made to local taxing officials in exchange for usual services, such as schools, furnished to the projects. Also, many expenditures have been made by the Federal Government for streets, utilities, schools, and other services normally furnished by taxing bodies.* As tax payments for a project normally have an ultimate effect on the rentals paid by military and civilian personnel at the military installations, it is important that no payments be made to communities which would constitute a windfall over and above normal taxes. Consequently, it is very important to assure that the project does not duplicate payments for services furnished to it. This duplication would be avoided under the provision in the bill for deductions from tax payments, as explained above." (Italics supplied.)

With minor amendments Section 603 of H. R. 11742, 84th Congress, became Section 511 of the Housing Act of 1956, approved August 7, 1956 (page 2 this brief).

It is obvious that the 84th Congress intended that the Secretary of Defense or his designee, in making Section 511 determinations, should take into account both payments for operation of schools and the cost of constructing an on-base school under P. L. 815, 81st Congress—as the designee of the Secretary of Defense did in this case (Tr. 17).

There is rational and statutory foundation for the Section 511 determinations involved in this case. And, in this case the facts are undisputed.

As the Supreme Court of the United States stated in *Securities and Exchange Com. v. Chenery Corp.*, 332 U. S. 194, 207, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947):

> "The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation."

Accordingly, the conclusion of the designee of the Secretary of Defense should not be disturbed, in the event appellant properly has questioned "the interpretation of the meaning of Section 511" (Br. 21).

However, conclusion of law No. V (Tr. 30) was properly made; and there having been no showing of arbitrary or capricious action, appellant is not entitled to review of the Section 511 determinations made by the designee of the Secretary of Defense.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

J. K. CHEADLE
Spokane, Washington
and
T. DAVID GNAGEY
Spokane, Washington

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